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RE YAP PING KON; EX P RHB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[BANKRUPTCY NO: 29-5308-2009]
B 3 SEPTEMBER 2012

BANKRUPTCY: *Notice - Setting aside - Appeal against - Appeal against Judgment debtor held dual citizenships - Sworn affidavit by judgment debtor with Malaysian address - Whether judgment debtor's country of domicile was Malaysia - Bankruptcy Act 1967, s. 5(1)*

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BANKRUPTCY: *Creditor's petition - Setting aside - Appeal against - Grounds of appeal - Appeal premised on same ground regarding judgment debtor's country of domicile*

D The judgment creditor ('JC') had commenced legal proceedings against the judgment debtor ('JD') in 1995 and subsequently obtained a judgment in the sum of RM3,224,505.50 against the JD in 2006. After an appeal to the Court of Appeal ('COA'), the JD, a permanent resident of Australia since 1987, left for Sydney
E in December 2007. The Australian Immigration then declared the JD as an 'onshore Australian' and thus granted him Australian citizenship in August 2009. It was undisputed was that the JD had retained his Malaysian citizenship. After the dismissal of the JD's appeal by the COA, a Bankruptcy Notice dated
F 17 December 2009 ('BN') was served on the JD *vide* substituted service and consequently, on 7 July 2011, the JC presented the Creditor's Petition. The JD proceeded with an application ('the application') to set aside the BN and CP but was dismissed by the learned Senior Assistant Registrar ('SAR'). This was the JD's
G appeal against the said SAR's decision. It was contended by the JD that learned SAR had erred in his decision as the condition in s. 5(1)(d) of the Bankruptcy Act 1967 was not satisfied as he was neither domiciled in Malaysia at the time of the presentation of the CP, nor was he an ordinary resident in Malaysia within one year
H prior to the presentation of the CP nor did he have dwelling house in this jurisdiction. The main issue that arose before the court was whether or not the JD was domiciled in Malaysia at the

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time of the presentation of the CP. It was also known that the JD had also written to the High Commission of Malaysia in Australia for the revocation of his citizenship sometime in 2012.

Held (dismissing appeal with costs):

(1) The onus is on the JD to prove with clear and unequivocal evidence that he had abandoned his domicile of origin as of 7 July 2011. This was not the case here as the JD's consistent lack of disclosure of his whereabouts and the existence of a significant debt suggests instead that this course of conduct was in fact fashioned/designed to avoid or evade liability for the judgment obtained against him in the legal proceedings by the JC. (*Algemene Bank Nederland v. Loo Choon Yow*) (paras 8 & 14)

(2) According to the affidavit made by the JD dated 29 September 2010, the JD was a Malaysian citizen who has an address in Kuala Lumpur, Malaysia. In addition, the JD had also continued to retain his Malaysian citizenship after being granted Australian citizenship and had omitted that he had become a citizen of Australia one month prior to the affirmation of the affidavit. Further, the JD had only renounced his Malaysian citizenship in 2012 and thus it would appear to the court that it was only then that it could be conclusive that the JD's domicile of origin had changed from Malaysia to Australia. Therefore, this can be used to conclude that the JD's country of domicile had been Malaysia. (paras 9-12)

Case(s) referred to:

Algemene Bank Nederland NV v. Loo Choon Yow [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846 ***(refd)***

Ramsey v. Liverpool Royal Infirmary [1930] AC 588 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 5(1)(d)

For the applicant - CB Loh (Kennine Ang with him); M/s Lee Hishamuddin Allen & Gledhill

For the respondent - Gopal Sreenevasan; M/s Sreenevasan Young

Reported by Baizura Abd Razak

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JUDGMENT

Nallini Pathmanathan J:

Decision

B **[1]** Yap Ping Kon, the judgment debtor in these bankruptcy proceedings has filed a notice of appeal against the decision of the Senior Assistant Registrar dated 8 June 2012 dismissing the judgment debtor's application to, *inter alia*, strike out the creditor's petition filed herein and dated 7 July 2011 ('CP') as well as to C set aside the bankruptcy notice dated 17 December 2009 ('BN'). The application was opposed by the judgment creditor successfully.

[2] The JD contends in this appeal that the learned Senior D Assistant Registrar erred in dismissing his application to strike out the CP and to set aside the BN which was premised on the basis that the judgment creditor ('JC') could not present the CP as the condition in s. 5(1)(d) of the Bankruptcy Act was not satisfied. Section 5(1) provides as follows:

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> 5(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
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> (a) The debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the F aggregate amount of debts owing to the several petitioning creditors amounts to thirty thousand ringgit, and
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> (b) the debt is a liquidated sum payable either immediately or at some certain future time; and
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> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition; and
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> (d) the debtor is domiciled in Malaysia or in any State or H within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by I means of a partner or partners or an agent or manager.

[3] The central issue in this appeal centres on whether or not the JD satisfied s. 5(1)(d) specifically, namely whether he was: A

(i) domiciled in Malaysia at the time of the presentation of the petition, ie, on 7 July 2011; or

(ii) ordinarily resident in Malaysia within one year before the date of the presentation of the petition, ie, 7 July 2010; or B

(iii) had a dwelling house in Malaysia.

[4] The background chronology of events relating to this matter is as follows: C

(i) In July 1987 the JD was granted permanent residence in Australia and he migrated to Sydney in January 1990;

(ii) In mid-1990 the JD returned to Malaysia and remained in Malaysia until December 2007, although keeping his permanent residence valid; D

(iii) In 1995 the JC commenced an action *vide* Kuala Lumpur High Court Civil Suit No. D5-22-520-1995 ('the D5 suit') E

(iv) On 5 July 2006 after a full trial the JC obtained judgment in the sum of RM3,224,505.50 against the JD;

(v) On 31 July 2006 the JD appealed to the Court of Appeal; F

(vi) In December 2007 the JD and his family returned to Sydney;

(vii) Between 15 December 2007 and 21 January 2012 the Australian Immigration records classified the JD as an 'onshore Australian' and disclosed that the JD had spent 238 days out of a possible 1499 days outside Australia. Of these 238 days, 163 were expended in Malaysia; G

(viii) In or around the end of August 2009 the JD was granted Australian citizenship. He retained his Malaysian citizenship too. H

(ix) On 29 September 2010 however the JD affirmed an affidavit for leave to adduce fresh evidence in the Court of Appeal. In this affidavit the JD averred as follows: I

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> ... I, Dato' Yap Ping Kon (NRIC No. 480728-10-5629) a Malaysian citizen of full age with an address No. 61, Jalan Medang Tanduk, Bukit Bandar Raya, 50100 Kuala Lumpur, do hereby solemnly and sincerely affirm and state as follows: ....

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(x) On 27 October 2010 the Court of Appeal dismissed the JD's appeal;

(xi) On 15 June 2011 the Bankruptcy Notice dated 17 December 2009 was served on the JD *vide* substituted
C service;

(xii) On 7 July 2011 the JC presented the creditor's petition;

(xiii) On 18 October 2011 the JD applied to set aside the CP and BN;

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(xiv) In February 2012 the JD wrote to the High Commission of Malaysia in Australia seeking to revoke his citizenship.

[5] In these circumstances the JD contends that the CP ought
E to be set aside because he was neither domiciled in Malaysia at the time of presentation of the petition on 7 July 2011, nor ordinarily resident in Malaysia within one year prior to the presentation of the petition, ie, on 7 July 2010 nor had a dwelling house in this jurisdiction.

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[6] The issue before this court is whether or not the JD was domiciled in Malaysia at the time of the presentation of the CP on 7 July 2011. The JD maintains that as of that date he was no longer domiciled in Malaysia but was indeed domiciled in Australia by reason of his having permanently emigrated there with his
G family as of 2007. To this end a perusal of the comprehensive submissions put forward by his counsel, seek to set out the details of his life in Australia with a view to establishing that the Court may, on the evidence before it, infer both the colour and characteristics of the JD's residence and animus for domicile in
H Australia. (see Viscount Dunedin in *Ramsey or Ramsey v. Liverpool Royal Infirmary* [1930] AC 588). In other words that a change in domicile from Malaysia to Australia had taken effect by that date and subsequently.

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[7] Both learned counsel for the JD and JC submitted that the burden of proof to establish a change of domicile from Malaysia to Australia as contended by the JD lies with the JD. In *Algemene Bank Nederland NV v. Loo Choon Yow* [1989] 2 CLJ 289; [1989] 2 CLJ (Rep) 846 Chan Sek Keong J held as follows:

> The law as to proof of change of domicile is set out in *8 Halsbury's Laws of England* (4th Edn) para 432 as follows:
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> There is a presumption against a change of domicile. The burden of proving any change of domicile rests therefore upon the person alleging it. A change of domicile is a serious matter, not to be lightly inferred and it must be clearly and unequivocally proved. Differing views have been expressed as to the standard of proof, whether it is normal civil standard, the balance of probabilities or some higher standard.
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> The task of proving a change of domicile is particularly onerous when the domicile alleged to be displaced is one of origin as opposed to one of choice.

[8] The onus is therefore on the JD to prove with clear and unequivocal evidence that he had abandoned his domicile of origin as of 7 July 2011.

[9] The facts as set out above disclose that although the JD had emigrated for Australia in 2007 he remained a citizen of Malaysia. It may be said that he had to do so because he only had permanent residence and therefore had to retain his Malaysian citizenship. Be that as it may it follows that when he left, as he puts it, permanently for Australia with his family, his domicile remained Malaysia because he retained his citizenship.

[10] The fact that he only expended 163 days in Malaysia between 2007 and January 2012 does not in itself detract from or alter the fact that his country of domicile remained Malaysia. Even when he was granted Australian citizenship in 2009 he retained his Malaysian citizenship. Can it then be concluded conclusively that he had altered his domicile to Australia then? It would appear not. There was no renunciation of his Malaysian citizenship at that time. The position is at best uncertain.

[11] The issue of the JD's domicile is further exacerbated by the JD's affirmation of an affidavit on 29 September 2010 where he expressly states that he is a Malaysian citizen who has an address in Kuala Lumpur. Nowhere does he provide disclosure to the effect that he was then residing permanently in Australia or that

A he has emigrated there but returned to Malaysia in relation to court proceedings. Learned counsel for the JD argues that this is not strictly necessary. However a perusal of the affidavit gives the clear impression that the JD was, as of that date, a citizen of Malaysia who was therefore domiciled in Malaysia.

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[12] Of equal significance is the fact that he omitted or failed to disclose that he had become a citizen of Australia about one month prior to the affirmation of the affidavit. If indeed the JD considered Australia as his country of domicile at the time of C affirmation of the affidavit in September 2010, it was extremely inconsistent for him to state on oath that he was a Malaysian citizen without also divulging his status as an Australian citizen. A consideration of the entirety of the evidence therefore discloses uncertainty and ambiguity as to the true domicile of the JD. Given D this inconsistency in the evidence which I find the JD has not in the course of his affidavits been able to clarify sufficiently or adequately, I have no option but to conclude that the JD has not been able to discharge the burden of proof cast upon him, more particularly in light of the existence of a presumption favouring E Malaysia as the country of domicile. It appears to this Court therefore that as of 29 September 2010 the JD was domiciled in Malaysia. At its highest it can be contended that as of that date there was uncertainty as to where the JD was domiciled. To my mind, it certainly cannot be said that domicile had altered to F Australia as of this date by reason of this affidavit.

[13] As of the date of the presentation of the petition, the JD had not renounced his citizenship. He only took steps to do so, in 2012, more specifically February 2012. The material before the G Court establishes that such renunciation took place in 2012 after the presentation of the Creditor's Petition. It would appear to this Court that it was only then that it could be conclusively concluded that domicile had changed from Malaysia to Australia.

[14] Having considered the entirety of the evidence, I am unable H to conclude with any degree of certainty that the JD has shifted the burden of proof which lies on him to establish that his country of domicile had altered to Australia such that he was no longer domiciled in Malaysia as of 7 July 2011. There is uncertainty and inconsistency in his conduct and the affidavit which shows I otherwise. It is therefore not possible for this Court in the face of such uncertainty and inconsistency to conclude that there was such a change of domicile.

[15] Indeed if at all any inference is to be drawn from the entirety of the conduct and chronology of events, the JD's consistent lack of disclosure of his whereabouts and the existence of a significant debt suggests instead that this course of conduct was in fact fashioned/designed to avoid or evade liability for the judgment obtained against him in the D5 suit.

[16] In so far as the other alternate conditions set out in s. 5(1)(d) pertaining to 'ordinarily resident' and the ownership of a dwelling house, it would appear that there are no facts to suggest that the JD was in fact ordinarily resident in Malaysia at the time or owned the dwelling house which it is stated is in his wife's name. The entire validity of the CP therefore turns on the issue of domicile which I determine in the JC's favour. Accordingly, the JD's appeal is dismissed with costs.